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91-1923

No. 91-

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

OAKWOOD PLAZA SHOPPING CENTER, INC., JOSEPH M. ARONOW and ANTHONY GALIOTO,

Petitioners,

-against-

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, d/b/a FL&S ASSOCIATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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Dated: *New York, New York*
May 26, 1992

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QUESTION PRESENTED FOR REVIEW

Whether a Pennsylvania cognovit judgment, entered without prior notice and an opportunity to be heard is entitled to be given full faith and credit effect in light of D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972), where there are no undisputed facts which support a finding of a knowing, voluntary and intelligent waiver of due process, and where there was no hearing prior to the entry of judgment in the sister state under full faith and credit to determine whether a knowing, voluntary and intelligent waiver of due process rights was in fact made?

PARTIES TO THE PROCEEDING

The parties to this proceeding are those named in the caption. There are no parent companies or subsidiaries of Petitioner Oakwood Plaza Shopping Center, Inc.

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OPINIONS BELOW

The New York State Court of Appeals affirmed the Order of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, which

affirmed the Order of the Supreme Court of the State of New York, County of New York, in an Opinion dated and entered on December 23, 1991, which is reproduced in the Appendix and published (*Leonard S. Fiore, Sr., et al. v. Oakwood Plaza Shopping Center, Inc., et al,* 78 N.Y.2d 572, 578 N.Y.S.2d 115 (1991)). A Motion for Reargument to the Appellate Division, First Judicial Department was denied in an unpublished Order dated May 9, 1991, which is reproduced in the Appendix. A Motion for Reargument to the Court of Appeals was denied in an unpublished Order dated February 25, 1992, which is reproduced in the Appendix. The Decision of the Supreme Court of the State of New York, Appellate Division, First Judicial Department is also reproduced in the Appendix and has been published (*Leonard S. Fiore, Sr. et al. v. Oakwood Plaza Shopping Center, Inc., et al.*, 164 A.D.2d 737, 56 N.Y.S.2d 799 (1st Dept. 1991)), as is the unreported Decision of the Supreme Court of the State of New York, County of New York.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the Fourteenth Amendment's Due Process Clause:

> ... nor shall any State deprive any person of life, liberty, or property without due process of law...

U.S. Const., Amend. XIV, Section 1; and

Article IV's Full Faith and Credit Clause:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const., Article IV, Section 1.

STATEMENT OF THE CASE

A. Factual Overview

Petitioners Joseph Aronow and Anthony Galioto ("Petitioners"), two New Yorkers, contracted to purchase a piece of land in Pennsylvania from Respondents, local businessmen. The contract obligated Respondents to obtain all necessary permits required so that Petitioners could build a shopping center of at least 161,200 square feet. This obligation survived the closing. Petitioners' obligation to pay Respondents was dependent upon Petitioners' ability to build at least 161,200 square feet, and was to be $ 9.00 per square foot of buildable space. The contract also required that the mortgage and so-called "Bond and Warrant" be in Pennsylvania statutory form.

At the closing, Petitioners were presented with various documents, which were prepared by Respondents' attorneys. Petitioners were not represented by counsel; although Petitioner Aronow is a New York attorney, he is not familiar with Pennsylvania laws.

Among these many documents was the pre-printed "Bond and Warrant", the face amount of which was $1.1 million. However, Petitioners' liability under the Bond and Warrant was dependent upon the obtaining by Respondents of all permits required to build a shopping center of at least 161,200 square feet. This condition was contained in a heavily negotiated typed and hand written rider to the

pre-printed Bond and Warrant.

In the *pre-printed* portion of the Bond and Warrant was a provision called a "cognovit" clause. This clause authorized Respondents' attorney to enter a judgment for the face amount of the document, without prior notice to the Petitioners, and irrespective of the conditions contained in the rider. Nowhere in the contract of sale was there any authorization, covenant or direction for the inclusion of a "cognovit" provision in the closing documents.

Petitioners signed the Bond and Warrant, containing the cognovit clause. However, Petitioners did so without knowledge of the presence of the cognovit provision. In fact, there are no indicia of Petitioners' knowledge of the cognovit provision, such as Petitioners' initials by that provision.

Petitioners signed the Bond and Warrant in reliance upon Respondents' obligation to present Pennsylvania statutory forms. In fact, the Bond and Warrant signed was not a Pennsylvania statutory form. The statutory form does not contain a "cognovit" clause or provision.

Whereas the typed and hand written rider was the focal point of heavy negotiations, the cognovit provision was not discussed at all, and Petitioners received no special consideration whatsoever for the pre-printed cognovit provision.

Subsequent to the closing, Respondents' failed to obtain the permits required to build a shopping center, and

Petitioners ceased payments under the Bond and Warrant.

Respondents, without giving any notice whatsoever to Petitioners, entered judgment against Petitioners in Pennsylvania by filing the cognovit with the Clerk of the Court. This Clerk, called the Prothonotary, ministerially entered the judgment and *then* sent a letter notifying Petitioners that there was a judgment against them in Pennsylvania.

Respondents then moved in the Supreme Court of the State of New York, New York County for Summary Judgment in lieu of Complaint on the Bond and Warrant under Civil Practice Law and Rules § 3213. However, upon a finding that a motion under Section 3213 was inappropriate and untenable, Respondents converted their "3213" action on a note to an action on the Pennsylvania cognovit judgment, seeking to enforce said judgment in New York State under the cloak of full faith and credit.

B. The Supreme Court of the State of New York ("Lower Court")

In an *affidavit in opposition* to Petitioners' cross motion to dismiss, Respondents for the first time raised the Pennsylvania cognovit judgment, when they referred to Respondents' "...Motion for Summary Judgment to enforce their validly entered Pennsylvania judgments..." (RA 179, para. 48).[1]

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[1] "RA ___" refers to the page number of Petitioners' Record on Appeal to the New York State Court of Appeals.

Petitioners responded to the raising of the Pennsylvania Cognovit Judgments by asserting that the cognovit judgment violated Petitioners' due process rights, thereby not entitling said judgment to full faith and credit enforcement in New York. In support of this, Petitioners attested to the facts that (i) they failed to receive notice of the cognovit proceeding prior to entry of judgment, (ii) they did not understand that they were signing a document containing a provision which authorized Respondents to *ex parte* enter judgment against them, (iii) they relied upon Respondents for the preparation of the documents, and upon Respondents' representations that the documents were fair and equitable to both sides and required under Pennsylvania law, (iv) they received no additional or special consideration for the inclusion of the cognovit provision, and (v) cognovit judgments are not accorded full faith and credit treatment in this State. See generally the affidavit of Petitioner Galioto sworn to on April 17, 1989 (RA 318 - 320, paras. 2 - 6); the affidavit of Petitioner Aronow sworn to on April 20, 1989 (RA 321 - 323; paras. 7 - 11); Aronow's affidavit sworn to on April 24, 1989 (RA 324 - 326; paras. 11 - 14, 17).

Specifically, Petitioner Galioto stated the following in his affidavit sworn to on April 17, 1989 (RA 318 - 320):

> "2) ...In this Pennsylvania procedure, I was given absolutely no notice of the action prior to its being brought before the Prothonotary. Instead, I was only given notice after the judgment had been entered against me through this ministerial act."

"3) ...I do not recall ever having had this document explained to me. Certainly, I would not have entered into this document had I been made aware of its potential consequences, which have, in fact, left me defenseless against a judgment of over $1,000,000.00..."

"6) In short, a Judgment of over $1,000,000.00 is rendered against me, of which Judgment I have received no prior notice. I understand from my New York attorneys that this Judgment entered based upon a Warrant of Attorney, has been found by the New York Court of Appeals to be in violation of my due process."

Petitioner Aronow stated the following in his affidavit sworn to on April 20, 1989 (RA 321 - 323):

"7. The New York State constitution requires notice of a hearing prior to the entry of judgments and of course the U.S. Constitution Due Process requires notice prior to a final judgment."

"8. The Pennsylvania filing of the cognovit judgment (like a mechanics lien) should not be regarded as a final judgment."

"9. In the instant matter, at the time of signing the mortgage documents, your deponent was offered no consideration for the cognovit judgment signing. The mortgage documents were prepared exclusively by plaintiffs (only the hand written portions calculating the amounts was done by defendant) and your deponent was led to believe that the forms for this mortgage were the standard and were statutorily required under Pennsylvania law to effect a mortgage and bond.

"10. ...your deponent feels he is being caught between two processes as explained by his counsel's Memorandum of Law, where a process like a mechanics lien in one state, but for historical or other reasons sounding like a judgment, is being made into a judgment in this state. I hope the line of cases given by counsel will clarify this point and show how this state does not and cannot enforce a mechanics lien cum [sic] judgment as a judgment of the foreign state."

"11. This summons and complaint is in fact a new action in this state without any enforceable foreign judgment in the full faith and credit sense of foreign judgments, and this court should consider this matter on the factual merits only."

Petitioner Aronow further stated the following in his affidavit sworn to on April 24, 1989 (RA 324-326):

"11. It was never explained by plaintiffs that contrary to the contract they were preparing cognovit judgments."

"12. At closing the plaintiffs presented the package of mortgage documents for signatures and the printed forms were signed perfunctory without study, relying on them to be in *statutory Pennsylvania form* and relying on statutory forms being fair and equitable to both sides..."

"14. Plaintiffs introduced the sued upon cognovit judgments under the guise that this was a statutory standard document required for this type of transaction."

"17. The plaintiffs have not disclosed to the court in Pennsylvania...that they obtained the cognovit powers by preparing papers that should have been

> the statutory standard document for a mortgage and note."

The Lower Court granted summary judgment upon its finding that the cognovit judgment entered in Pennsylvania did comply with due process requirements and was, therefore entitled to full faith and credit in this State. Specifically, the Lower Court held the following:

> "With respect to the two Pennsylvania Judgments, the notice and opportunity to be heard requirements mandated by Pennsylvania law and the due process clause of the Constitution have been met" (RA 8), and
>
> "...it is well settled law that a judgment is entitled to full faith and credit if it is...consistent with the due process requirements of the U.S. Constitution. U.S.C.A. Const. Art. IV, Sec. 1; 28 U.S.C.A. [Sec] 1738; *see Atlas Credit Corp. v. Ezrine*, 25 NY2d 219." (RA 11)

C. The Appellate Division of the Supreme Court of the State of New York ("Appellate Division")

The Appellate Division, in affirming the Lower Court, found that the cognovit judgment entered in this case did comport with the requirements of due process:

> "Under the circumstances herein, where the parties were engaged in an arms length business transaction, were represented by counsel, and the defendant was on actual notice of the entry of the judgment and, in fact, sought to challenge same prior to execution, it cannot be said that the

cognovit judgment amounted to a deprivation of property rights without due process."

The Appellate Division denied a Motion for Reargument on May 9, 1991.

D. The New York State Court of Appeals ("Court of Appeals")

The Court of Appeals affirmed the Decision of the Appellate Division. In so doing the Court of Appeals rejected Petitioners' factual assertions that they did not knowingly, voluntarily and intelligently waive their due process rights, and held that, under the facts of this case, Petitioners had made an effective waiver of due process. The Court of Appeals denied a Motion for Reargument on February 25, 1992.

REASONS FOR GRANTING THE WRIT

A. Supreme Court Rule 10.1 Considerations.

The issue in this case is whether a Pennsylvania cognovit judgment, entered without prior notice and an opportunity to be heard, is entitled to be given full faith and credit effect in light of *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 92 S. Ct. 775, 31 L.Ed.2d 124 (1972), where there are no undisputed facts which support a finding of a knowing, voluntary and intelligent waiver of due process, and where there was no hearing prior to the entry of judgment in the sister state under full faith and credit to determine whether a knowing, voluntary and intelligent waiver of due process rights was in fact made. Thus, this Court should grant certiorari to resolve the conflict between *Overmyer* (which held that on the *undisputed* facts before it, an effective waiver of due process had been made), and the New York Court of Appeals' decision in this case, which made the same determination on *disputed* facts, and where no evidentiary hearing on the issue of waiver had been conducted in any lower New York Court.

This case also merits this Court's review because of the conflict between the New York Court of Appeals in this case, and the Third Circuit Court of Appeals in *FRG, Inc. v. Manley*, 919 F.2d 850 (3rd Cir. 1990), and the Supreme Court of the State of California in *Isbell v*

County of Sonoma, 145 Cal.Rptr. 368, 577 P.2d 188 (Cal.S.Ct. 1978).

In *FRG*, *supra*, the Third Circuit followed *Overmyer* in holding that on the undisputed facts before it, it could be determined that a knowing, voluntary and intelligent waiver of due process was made. In *Sonoma*, *supra*, however, the California Supreme Court held that its State's cognovit scheme was unconstitutional because it did not provide for some showing to determine whether the debtor had made a knowing, voluntary and intelligent waiver of due process before entry of judgment (*i.e.* whether the waiver was effective).

The New York Court of Appeals in this case departed from both the Third Circuit and the California Supreme Court in finding on disputed facts that an effective waiver of due process was made and that an evidentiary hearing to determine the effectiveness of the alleged waiver was unnecessary, thereby further warranting this Court's review.

In *Overmyer*, *supra*, this Court was presented with the following undisputed facts: Overmyer, a large multi-national corporation with extensive legal representation, entered into a contract pursuant to which Frick was to perform certain work, for which Overmyer would pay in installments. Overmyer fell behind in its payments and Frick stopped its work and filed various mechanic's liens for the arrearage. As part of a settlement of this initial dispute, Overmyer executed a note (which did not contain a cognovit provision) in favor of Frick for a portion of the

arrearage, which was to be paid in installments. Subsequently, after Frick completed its work to Overmyer's satisfaction, Overmyer asked for additional time to make its payments under the note, and that Frick release its mechanic's liens. 405 U.S. at p. 179 - 180, 92 S.Ct. at p. 779.

Negotiations between the parties then ensued which resulted in the following agreement: Overmyer agreed to execute mortgages to Frick, and a new note *containing a cognovit provision*. In consideration for the cognovit provision, Overmyer got an extra year to make its payments, resulting in a reduction in its monthly payments by more than half, Overmyer's interest rate was reduced by one-half of a point, and Frick agreed to release its mechanic's liens. The cognovit provision executed by Overmyer allowed the holder of the note to designate an attorney to confess judgment against Overmyer for the principal of the note plus interest only in a Court in Ohio, and only in the event of a default by Overmyer and if said default lasted for fifteen days. 405 U.S. at p. 180, 92 S.Ct. at p. 780.

Subsequently, Overmyer again defaulted under the new note, and Frick entered judgment against Overmyer pursuant to the cognovit provision without prior notice to Overmyer of entry of the judgment. Importantly Overmyer did not dispute that it waived due process: it merely contended that due process could not be waived.

In holding that in the situation described above, Overmyer had *knowingly, voluntarily* and *intelligently* waived

its due process rights, the Court noted Frick's fulfillment of the initial contract, Overmyer's repeated delinquencies, Overmyer's representation by counsel and the specific consideration obtained by Overmyer for the execution of the cognovit provision:

> "Frick completed its work and Overmyer accepted the work as satisfactory. Thereafter Overmyer again asked for relief. At this time counsel for each side participated in the negotiations. The first note was replaced by the second. The latter contained the confession of judgment provision Overmyer *now finds* so offensive. However, in exchange for that provision and for its execution of the second mortgages, Overmyer received benefit and consideration in the form of (a) Frick's release of the three mechanic's liens, (b) reduction in the amount of the monthly payment, (c) further time in which the total amount was to be paid, and (d) reduction of a half point in the interest rate." 405 U.S. at p. 183, 92 S.Ct. at p. 781.

This Court held, after reiterating that the right to due process may be waived provided there is a knowing, voluntary and intelligent waiver, that in light of Overmyer's huge size and sophistication, in light of the extensive consideration obtained by Overmyer for signing the cognovit provision and in light of the fact that Overmyer does not and could not, contend that it was not aware of the significance and inclusion of the cognovit provision, Overmyer did on the undisputed facts before the Court, knowingly, voluntarily and intelligently waive its due process rights:

"Overmyer is a corporation. Its corporate structure is complicated. Its activities are widespread. As its counsel in the Ohio post-judgment proceeding stated, it has built many warehouses in many states and has been party to 'tens of thousands of contracts with many contractors.' *This is not a case of unequal bargaining power or overreaching.* The Overmyer-Frick agreement, from the start, was not a contract of adhesion. There was no refusal on Frick's part to deal with Overmyer unless Overmyer agreed to a cognovit. The initial contract between the two corporations contained no confession-of-judgment clause. When, later, the first installment note from Overmyer came into being, it too, contained no provision of that kind. It was only after Frick's work was completed and accepted by Overmyer, and when Overmyer again became delinquent in its payments on the matured claim and asked for further relief, that the second note containing the clause was executed."

"*Overmyer does not contend here that it or its counsel was not aware of the significance of the note and of the cognovit provision.* Indeed, it could not do so in light of the facts. Frick had suggested the provision in October 1966, but the first note, readjusting the process payments, was executed without it. It appeared in the second note *delivered by Overmyer's own counsel in return for substantial benefits and consideration to Overmyer.* Particularly important, it would seem, was the release of Frick's mechanic's liens, but there were, in addition, the monetary relief as to amount, time and interest rate." 405 U.S. at p. 186, 92 S.Ct. at pp. 782-3. (Italics added)

The Court carefully cautioned in its concluding discussion the following:

> "Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor received nothing for the cognovit provision, other legal consequences may ensue." 405 U.S. at p. 188, 92 S.Ct. at p. 783.

Thus, in the above undisputed factual situation, where the signor of the cognovit provision was a large multi-national corporation, with vast legal representation, fully aware of the implications of the cognovit provision, and the cognovit provision was executed to settle an existing dispute, was heavily negotiated and for which was received extensive consideration, this Court found that it was unquestionable that an effective waiver of due process was made, and that the cognovit judgment was constitutional.

This Court's holding in *Overmyer* was followed by the Third Circuit in *FRG, supra*. In *FRG*, the Third Circuit was presented with a case in which FRG, Inc. and another company, in settlement of a lawsuit brought by one Bruce Manley against FRG, gave Manley a promissory note for $100,000.00 which contained a cognovit provision. FRG defaulted in its installments payments under the note, and Manley entered judgment in Pennsylvania against FRG pursuant to the cognovit provision without prior notice to FRG.

The Third Circuit held that this Pennsylvania cognovit judgment was constitutional, based upon its finding that, upon the undisputed facts presented, it was clear that

FRG knowingly, voluntarily and intelligently waived its right to due process.

Specifically, the Court found that because the debtors were substantial business entities, with sophisticated principals, who were knowledgeable in business matters, and that the confession of judgment clause was negotiated and specifically agreed upon in a commercial context in settlement of major litigation between parties represented by counsel, that FRG unequivocally knowingly, voluntarily and intelligently waived its rights to due process. The Third Circuit began it recitation of the facts by stating that "*The basic facts are not in dispute*" (919 F.2d at p. 852 [emphasis added]), and shortly thereafter in its decision, specifically noted that

> "The debtors' counsel specifically agreed to this confession of judgment provision and helped to draft it." 919 F.2d at p. 852.

Then, after stating that "In *Overmyer*, the debtor was a substantial corporation with principals fully aware of the impact of the confession of judgment clause [citation omitted]," 919 F.2d at p. 856, the Court concluded that

> "This case is much more like *Overmyer* than *Souders* [in which the Bankruptcy Court for the Eastern District of Pennsylvania held Pennsylvania cognovit judgments to be *per se* unconstitutional], as the debtors here seem to be business entities with sophisticated principals, knowledgeable in business matters. Furthermore, the confession of judgment clause here was negotiated and specifically agreed upon in a commercial context in settlement of major litigation between parties

represented by counsel." 919 F.2d at p. 857.

Thus, as the United States Supreme Court found in *Overmyer, supra,* the Third Circuit found in *FRG, supra,* that where the undisputed facts clearly indicate a knowing, voluntary and intelligent waiver of due process rights, then the cognovit judgment may be constitutional.

The New York Court of Appeals in this case, although purporting to rely upon the *Overmyer, supra,* holding, departed from both the Supreme Court and the Third Circuit by relying on "substantial evidence of waiver" rather than on undisputed facts of waiver to find that Petitioners knowingly, voluntarily and intelligently waived their due process rights, and that therefore a hearing to determine the effectiveness of the alleged waiver was not necessary.

Specifically, the Court of Appeals stated the following:

> "We are left then with the Supreme Court's conclusion that 'due process rights to notice and hearing prior to a civil judgment are subject to waiver.' (*Overmyer*, 405 US at 185, *supra*.) All that remains is to apply the waiver analysis in the present case to determine whether defendants voluntarily, knowingly and intelligently waived those rights. We conclude that they did waive those rights as a matter of law.
>
> Defendants were sophisticated parties involved in an arms-length commercial transaction--the transfer of a parcel of land for development as a shopping mall (*see, In re FRG, Inc.*, 919 F.2d 850, 857 [3d

Cir.]). The purchase price of the land alone was well in excess of one million dollars, indicating the magnitude of the project. Furthermore, the parties were represented by counsel in negotiating the terms of the agreement. Defendant Aronow claims not to have had counsel--a fact disputed by plaintiffs--but Aronow himself is an attorney.

Defendants also claim that they received no consideration for the cognovit provision, citing the Supreme Court's observation in *Overmyer* that the creditors in that case had made specific concessions in order to obtain the confession of judgment clause. In fact, the present case resembles *Overmyer* in this respect: *defendants sought modification of the payment terms--from a lump sum due at closing to a two-year payment schedule--and in return for this modification executed the bond and warrant. Clearly, that security device was given in exchange for the extended payment schedule.*

Finally, *defendants argue that, unlike the obligors in Overmyer, they were unaware of the cognovit clause*, which they claim was "buried" in the bond and warrant. In *Overmyer*, the Supreme Court noted that the obligor did not contend that it was unaware of the cognovit provision and that '[i]ndeed it could not do so in light of the facts.' (405 US at 186). The facts before us likewise belie defendants' assertion that they were unaware of the cognovit provision. The bond and warrant is a three-page document, with the cognovit clause the only provision on the last page, several lines above defendants' signatures. The bald assertion that these sophisticated defendants, entering upon a significant transaction, did not read the document cannot excuse *their legal obligation or overcome the substantial evidence of waiver (see, Matzger v. Aetna Ins. Co.*, 227 NY 411, 416).

> As the Supreme Court noted, 'where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue.' (*Overmyer*, 405 US at 188). By contrast, the contract here was not one of adhesion, but rather represented a bargain struck between sophisticated commercial parties. It is clear that defendants made a voluntary, knowing and intelligent waiver of their right to notice and an opportunity to be heard, and should be held to the consequences of their conduct [emphasis added]."

The alleged facts relied upon by the New York Court of Appeals above are either disputed facts or presumptions. The Court of Appeals finding that Petitioners were "sophisticated parties" is a mere presumption. The Court's finding that Petitioners "were represented by counsel in negotiating the terms of the agreement" is a fact disputed by Petitioners.[2] The Court's factual finding that Petitioners received consideration for the cognovit (in addition to being an impermissible fact finding function of the Court as set forth below) is hotly disputed by Petitioners (RA 321 - 323). Finally, despite the fact that the Court of Appeals acknowledges that Petitioners dispute the fact that they were aware of the cognovit provision, the Court nevertheless held that

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[2] Although Petitioner Aronow admittedly is an attorney, he is a New York attorney, not familiar with cognovit judgments or Pennsylvania procedure. Furthermore, he was a principal in the transaction and not acting in the capacity of an attorney representing a client.

> "The bald assertion that these sophisticated defendants, entering upon a significant transaction, did not read the document cannot excuse *their legal obligation or overcome the substantial evidence of waiver (see, Metzger v. Aetna Ins. Co.*, 227 NY 411, 416) [emphasis added]."

In fact, the New York Court of Appeals made findings of fact not supported by the Record in violation of Article 6, Section 3 of the New York State Constitution. Article 6, Section 3 of the New York State Constitution provides the following:

> "§ 3. [Jurisdiction of court of appeals]
>
> > a. The jurisdiction of the court of appeals shall be limited to the review of questions of law..."

In spite of this constitutional requirement, the Court of Appeals in this case made a finding of fact which, in addition to being contrary to the New York State Constitution, was incorrect. Specifically, the Court of Appeals found the following:

> "Defendants also claim that they received no consideration for the cognovit provision, citing the Supreme Court's observation in *Overmyer* that the creditors in that case had made specific concessions in order to obtain the confession of judgment clause. In fact, the present case resembles *Overmyer* in this respect: defendants sought modification of the payment terms--from a lump sum due at closing to a two-year payment schedule--and in return for this modification executed the bond and warrant. Clearly, that security device was given in exchange for the

extended payment schedule."

The finding of fact made by the Court of Appeals--that "defendants sought modification of the payment terms--from a lump sum due at closing to a two-year payment schedule--and in return for this modification executed the bond and warrant"--is clearly not permitted by the New York State Constitution.

In addition, this finding of fact made by the Court of Appeals is not supported by the Record. On the contrary, it was Respondents who requested that Petitioners close prior to the obtaining of approvals so that Respondents could obtain some cash in order to, supposedly, obtain the approvals, and it was due to this request by Respondents that the Bond and Warrant were executed.

Therefore, the Court of Appeals erred both by making a finding of fact and by making an erroneous finding of fact.

Thus, the Court of Appeals re-wrote the rule on the constitutionality of cognovit judgments. The rule according to this Court in *Overmyer, supra*, and followed by the Third Circuit in *FRG, supra,* is that cognovit judgments meet Constitutional muster only when there are undisputed facts which unquestionably show a knowing, voluntary and intelligent waiver of due process. The rule according to the New York Court of Appeals in this case, however, is that the judgment debtor (Petitioners herein) must "overcome the *substantial evidence* of waiver," "substantial

evidence" based upon presumptions and disputed facts. This goes contrary not only to the holding at this Court in *Overmyer, supra,* but also to the principal reiterated by this Court in *Fuentes v. Shevin,* 407 U.S. 67 (1972). In *Fuentes*, this Court stated that "[W]e do not presume acquiescence in the loss of fundamental rights...[i]ndeed in the civil no less than the criminal area, courts indulge in every reasonable presumption against waiver." 407 U.S. at 94, footnote 31.

This case, therefore, merits this Court's review to rectify this departure by the New York Court of Appeals in this case from the Supreme Court of the United States and followed by the Third Circuit.

This case merits this Court's review likewise to resolve the conflict between the New York Court of Appeals in this case and the decision of the California Supreme Court in *Isbell v. County of Sonoma, supra.* In *Sonoma,* the California Supreme Court held that the California confession of judgment statute was unconstitutional because it did not provide for some showing prior to entry of judgment to determine whether the debtor knowingly, voluntarily and intelligently waived his due process right. Specifically, the Court stated the following:

> "We shall explain that a signed confession of judgment is not adequate proof that the debtor has validly waived his due process rights; rather than emerging from negotiations between knowledgeable bargainers, such confessions are most often executed by debtors who have little understanding of the significance of their waiver

> and little choice in the matter. Because the California statute provides insufficient safeguards to assure that the debtor in fact executed a voluntary, knowing and intelligent waiver, and because the debtor's opportunity to seek post-judgment relief does not cure the unconstitutionality of a judgment entered without a valid waiver, we conclude that the confession of judgment procedures established in sections 1132 through 1134 violates the due process clause of the Fourteenth Amendment." 577 P.2d at pp. 189-190.

As noted above in *Sonoma, supra,* the California Supreme Court was concerned with the "meaningful time and manner" aspect of due process. It clearly demonstrated that the failure of it's cognovit scheme to provide some evidence of waiver other than the debtor's signature on the confession of judgment clause was required by due process. That Court relied on *Fuentes v. Shevin, supra,* which required a clear waiver before the state may seize property upon the application of another. The New York Court of Appeals failed to specifically address this point which was raised below. Is is an important consideration because it is a fundamental axiom to due process that a person is entitled to notice and an opportunity for a hearing before the state may enter final judgment.

The decision of the Court of Appeals in this case directly conflicts with the decision of the California Supreme Court in *Sonoma,* in that the New York State Court of Appeals is willing to rely upon "substantial evidence of waiver", based upon disputed facts and presumptions, in contrast to the California Supreme Court

which held that there must be some showing to determine whether a waiver was actually effected.[3] On this basis, as well, the within case merits this Court's review.

The New York Court of Appeals and California Supreme Court likewise differ in their interpretation of the holding of *Overmyer*. In *Sonoma, supra*, the California Supreme Court held that the California confession of judgment scheme was *per se* unconstitutional. In so doing, the California Supreme Court noted that there were significant distinctions between the California confession of judgment scheme and the Ohio confession of judgment scheme involved in *Overmyer, supra*. Nevertheless, the California Supreme Court stated the following with respect to *Overmyer, supra:*

> "...more significantly, the *Overmyer* decision nowhere addresses the issue, crucial to the present case, whether the Ohio statutes established a constitutionally adequate procedure for assuring that a valid waiver of constitutional rights had occurred. In *Overmyer* the judgment debtor did not attack the adequacy of the record, but instead broadly claimed that an individual could never validly waive all rights to notice and hearing

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[3] This is not unlike numerous other federal and state courts which have likewise held that there must be a pre-entry hearing to determine the effectiveness of an alleged waiver of due process rights. *See, e.g., Money Management, Inc. v. Vetere*, 436 N.Y.S.2d 158 (N.Y. City Civ. Ct. 1981); *Osmond v. Spence*, 327 F.Supp. 1349, remanded, 405 U.S. 971, 92 S.Ct. 1189, 31 L.Ed.2d 245, 359 F.Supp. 124 (D.C.Del. 1972); *Scott v. Danaher*, 343 F.Supp. 1272 (D.C. Ill. 1972); *Virgin Islands Nat'l Bank v. Tropical Ventures, Inc.*, 358 F.Supp. 1203 (D. Virgin Islands 1973); *In Re Souders*, 75 B.R. 427 (Bkrtcy.E.D.Pa. 1987).

> through a confession of judgment agreement. The *Overmiyer* decision went no further than to reject the broad proposition and to hold on the facts before it that D.H. Overmyer Co...had 'voluntarily, intelligently and knowingly' waived its constitutional rights [citations omitted].
>
> "Since it is axiomatic that 'cases are not authority for the propositions not considered therein' [citation omitted], we conclude that *Overmyer* did not resolve that a confession of judgment procedure which requires the entry of judgment without a sufficient showing of a valid waiver is consonant with due process....*Overmyer,* therefore does not conflict with our conclusion that the California confession of judgment procedure is constitutionally infirm." 577 P.2d at p. 195."

Thus, it is clear from the above that the California Supreme Court construed this Court's decision in *Overmyer* as having little or no precedential value. The California Supreme also construed *Overmyer* as not preventing the Court from holding that California's cognovit scheme was unconstitutional because it did not require a sufficient showing of a knowing, voluntary and intelligent waiver of due process prior to entry of judgment by a clerk.

The New York Court of Appeals, on the other hand, interpreted *Overmyer* as having great precedential value, and as standing for the proposition that where there is "substantial evidence of waiver *(see, Metzger v. Aetna Ins. Co.,* 227 NY 411, 416)", no hearing is required.

Thus, this case merits review by this Court to resolve which interpretation of *Overmyer* is the correct one.

In sum, the New York Court of Appeals in this case relied upon disputed facts and presumptions to find that Petitioners had knowingly, voluntarily and intelligently waived their due process rights. The decision of the New York Court of Appeals departed from this Court's holding in *Overmyer, supra,* that such a finding can only be made on undisputed, unequivocal facts. For this reason, and to correct the violation of Petitioners' due process rights, this case merits review by this Court.

CONCLUSION

For the foregoing reasons, we respectfully request that this petition for a writ of certiorari be granted.

Dated: New York, New York
May 26, 1992

Respectfully submitted,

ALLEN C. COHEN
Attorney for Petitioners
Oakwood Plaza Shopping Center, Inc.
Joseph M. Aronow and
Anthony Galioto

No. 91 -

In The

Supreme Court of the United States

October Term, 1991

OAKWOOD PLAZA SHOPPING CENTER, INC., JOSEPH M. ARONOW and ANTHONY GALIOTO,

Petitioners,

-against-

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, d/b/a FL&S ASSOCIATES,

Respondents.

APPENDIX

SW

St. Louis & Westervelt, Inc. (3292)

APPENDIX A - OPINION AND ORDER OF AFFIRMANCE OF NEW YORK STATE COURT OF APPEALS, DATED DECEMBER 23, 1991 (78 N.Y.2d 572) [PAGES 1a - 13a]

State of New York
Court of Appeals

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1 No. 257
Leonard S. Fiore, Sr., et al.,

Respondents,

v.

Oakwood Plaza Shopping
Center, Inc., et al.,

Appellants.

Allen C. Cohen, for appellants.
Roy A. Powell, for respondents.

KAYE, J.:

[1] Judgments by confession, recognized both as "the loosest way of binding a man's property that ever was devised in any civilized country" *(Alderman v Diament,* 7 NJL 197, 198) and as devices that "serve a proper and useful purpose in the commercial world" *(Overmyer Co. v Frick Co.,* 405 US 174, 188), in this State have been strictly limited by the Legislature (*see,* CPLR 3218). The present case calls upon us to determine whether a Pennsylvania cognovit judgment,

APPENDIX A
[Opinion and Order - NYCA (1991)]

obtained under that State's laws, should be given full faith and credit here (*see*, US Const, art IV, § 1; 28 USC § 1738). Given the procedures followed in Pennsylvania, we agree with the trial court and the Appellate Division that the Pennsylvania judgment may be enforced against defendant-appellants in New York.

I.

In July 1986, plaintiffs contracted to sell a 14.8 acre parcel located in Patton Township, Centre County, Pennsylvania to State College Development Company, predecessor in interest to defendant Oakwood Plaza Shopping Center. Defendants Joseph Aronow and Anthony Galioto are principals in Oakwood. Under the agreement, the purchase price was to be determined by the number of square feet approved by the local authorities for use as retail sales space. Initially, the full purchase price was to be paid at closing--to occur no later than March 1987.

At defendants' request, a rider was later executed that changed the payment terms: $600,000 to be paid at closing, the remainder secured by a purchase money mortgage and note. Closing took place on December 23, 1986, at which time plaintiffs delivered the deed to the parcel and defendants paid $700,000 toward the purchase price. Oakwood executed a $1.1 million purchase money mortgage. Additionally, Oakwood, as well as Aronow and Galioto individually, executed a "bond and warrant" obligating them to pay $1.1 million with interest at 9% per annum. The bond contained a "warrant of attorney" through which defendants

authorized plaintiffs' attorney to confess judgment against them in the amount of $1.1 million.

Defendants failed to make the required payments. On September 9, 1988, in the Pennsylvania Court of Common Pleas, plaintiffs filed a complaint in confession of judgment as well as a praecipe to enter judgment against defendants (Pa Rules Civ Pro, rule 2951). On the same day, the prothonotary entered final judgment against defendants in the amount of $1,216,145 and sent them a notice of entry of final judgment and a copy of the complaint. A second judgment--in the amount of $1,287,713--was obtained against defendant Oakwood on the purchase money mortgage after Oakwood failed to appear and defend the action.

In November 1988, plaintiffs served a demand for discovery in aid of execution upon defendants. After defendants failed to respond, plaintiffs filed a motion in the Pennsylvania Court of Common Pleas to compel discovery and impose sanctions which the court, in January 1989, granted.

Defendants, in May 1989, filed a petition to open or strike the judgment (Pa Rules Civ Pro, rule 2959). The Court of Common Pleas, after a hearing, denied the petition, concluding that the petition was both untimely and raised no meritorious defense. Three months later, in September 1989, defendants filed an untimely appeal of that decision which was later withdrawn. In October 1989, the Pennsylvania court, after a hearing, held defendants in criminal contempt for failure to comply with the court's order directing them to respond to plaintiffs' discovery requests. Substantial monetary

penalties were imposed.

Frustrated in their enforcement efforts in Pennsylvania, plaintiffs commenced the present New York action in January 1989 by summons and notice of motion for summary judgment in lieu of complaint (*see*, CPLR 3213). The action, originally framed as one "upon an instrument for the payment of money only" (based on the bond and warrant), was later converted into an action upon the two Pennsylvania judgments. Defendants filed a cross motion to dismiss for legal insufficiency (CPLR 3211[a][7]).

Supreme Court granted plaintiffs' motion for summary judgment, concluding that the Pennsylvania court had personal jurisdiction over defendants, that due process requirements had been satisfied, and that the judgments were valid and conclusive in the forum State. As a result, the court concluded, the Pennsylvania judgments were entitled to full faith and credit. Finally, the court denied defendants' cross motion, holding that it was precluded from looking beyond the jurisdictional aspects of the Pennsylvania proceedings.

The Appellate Division affirmed, agreeing that the Pennsylvania cognovit judgment on the bond and warrant should be accorded full faith and credit. The court concluded that under the circumstances "where the parties were engaged in an arms length business transaction, were represented by counsel, and the defendant was on actual notice of the entry of the judgment and, in fact, sought to challenge same prior to execution, it cannot be said that the cognovit judgment amounted to a deprivation of property rights without due process." (164 AD2d 737, 742).

On this appeal, defendants again attempt to argue the merits of the Pennsylvania judgment. In addition, defendants argue that cognovit judgments as a matter of law are not entitled to full faith and credit in this State, citing this Court's decision in *Atlas Credit Corp. v Ezrine* (25 NY2d 219). Plaintiffs respond that United States Supreme Court decisions rendered after *Atlas* have made clear that cognovit judgments are not *per se* unconstitutional. Rather, plaintiffs assert, a case-by-case analysis is required to determine whether defendants voluntarily, knowingly and intelligently waived their rights to notice and an opportunity to be heard. The facts clearly demonstrate that such a valid waiver was effected, according to plaintiffs, and therefore the Pennsylvania judgment should be afforded full faith and credit. Agreeing with plaintiffs' arguments, we now affirm the Appellate Division order.

II.

[2] As a matter of full faith and credit, review by the courts of this State is limited to determining whether the rendering court had jurisdiction, an inquiry which includes due process considerations *(Parker v Hoefer,* 2 NY2d 612, *cert. denied* 355 US 833; *see also, Augusta Lbr. & Supply v Sabbeth Corp.,* 101 AD2d 846; 4 Weinstein-Korn-Miller, NY Civ Prac § 3213.04). Thus, inquiry into the merits of the underlying dispute is foreclosed; the facts have bearing only in the limited context of our jurisdictional review *(Parker v Hoefer, supra,* at 616-617). Moreover, although this is a confessed judgment, defendants have been offered, and have

availed themselves of, a full and fair opportunity to argue the merits in the Pennsylvania courts.

The cognovit is a contractual provision, employed as a security device, whereby the obligor consents in advance to the creditor's obtaining a judgment without notice or hearing (*see, Overmyer Co. v Frick Co.*, 405 US, at 176, *supra*). In the present case, the cognovit contained a "warrant of attorney," a provision that empowers any attorney to enter the obligor's appearance in any court of record and to waive--on the obligor's behalf--process and consent to the entry of judgment (*Atlas Credit Corp. v Ezrine*, 25 NY2d, at 225, *supra*).

In *Atlas*, this Court held that the Pennsylvania cognovit judgment in issue was not entitled to full faith and credit. First, we concluded that the cognovit "judgment" was a judgment in name only, having none of the "minimums of judicial process" usually associated with that term. For that reason alone, the cognovit judgment was not entitled to full faith and credit (25 NY2d at 229-230, *supra*). Second, as recognition of the judgment was not constitutionally mandated, we determined that enforcing the cognovit judgment would be repugnant to New York policy (25 NY2d, at 230). Finally, we held that even assuming the cognovit could qualify as a judgment for full faith and credit purposes, the Pennsylvania judgment was not enforceable in this State because cognovit judgments that provide for entry of a judgment by confession anywhere in the world without notice are *per se* unconstitutional (25 NY2d, at 231-232).

In *Atlas*, this Court noted that United States Supreme

Court precedent considering cognovit judgments stood only for the proposition that the terms of a warrant of attorney should be strictly construed (25 NY2d, at 227, *supra*). The Supreme Court had not yet spoken on the constitutionally of such judgments. Several years after *Atlas*--in the companion cases *Overmyer Co. v Frick Co.* (405 US 174, *supra*) and *Swarb v Lennox* (405 US 191)--the United States Supreme Court did have the opportunity to consider whether cognovit judgments were *per se* unconstitutional.

In *Overmyer*, the Court ruled that Ohio's cognovit procedure was not *per se* unconstitutional (405 US, at 187, *supra*). Instead, the Court directed attention to the effectiveness of the obligor's waiver of due process rights, a necessarily fact-specific inquiry, concluding from the facts that the obligor there had effectively waived those rights *(id.)*. First, the Court assumed that the proper standard for determining the effectiveness of the waiver was the same as in criminal proceedings, "that is, that it be voluntary, knowing, and intelligently made" (405 US, at 185). The Court emphasized that the obligors were sophisticated corporations, represented by counsel, involved in an arms-length commercial transaction. Furthermore, the cognovit clause was contained in a contract modification that had been effected after the obligor defaulted on its obligations and for which it received consideration. Thus, the Court concluded, the obligor in *Overmyer* had effectively waived its right to notice and a hearing.

Finally, the Court in *Overmyer* observed that the obligor was not--by execution of the cognovit clause--rendered defenseless (405 US, at 188, *supra*). Rather, under Ohio law

the obligor could seek to vacate the judgment --indeed, the obligor had in fact had a post-judgment hearing in an Ohio court. The concurrence emphasized the availability of post-judgment hearing as an avenue of relief for an obligor with a legitimate defense (405 US at 189-190 [Douglas, J., concurring]). [1]

In *Swarb*, the Supreme Court considered a constitutional challenge to the Pennsylvania cognovit judgment scheme, and rejected plaintiffs' argument that the procedure was invalid on its face. The Court, citing *Overmyer*, reiterated that "under appropriate circumstances, a cognovit debtor may be held effectively and legally to have waived those rights he would possess if the document signed had contained no cognovit provision." (405 US, at 200, *supra*).

We therefore consider the impact of *Overmyer* and *Swarb* on our earlier holding in *Atlas* that Pennsylvania cognovit judgments are not entitled to full faith and credit.

[3] It is evident that the conclusion reached in *Atlas* concerning the *per se* unconstitutionality of the Pennsylvania cognovit scheme is itself no longer valid in light of the subsequent Supreme Court decisions (*see, Money Mgt v Vetere*, 107 Misc2d 861, 863-864; *In re PCH Assocs.*, 122 Bankr 181, 194-195 [SDNY] [questioning the continued validity of the *Atlas* analysis in light of *Overmyer* and *Swarb*];

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[1] Justice Douglas contrasted the Ohio post-judgment procedure with the Pennsylvania procedure involved in *Swarb v Lennox* (405 US 191), which he found imposed a stiffer--and "undue"--burden of persuasion on the debtor (405 US, at 190, fn, supra). The Pennsylvania procedure was subsequently amended, and now places the same burden of persuasion on the debtor as was found in the Ohio scheme--sufficient evidence to raise a jury question (see, Pa Rules Civ Pro, rule 2959[e]).

see also, Siegel, NY Prac, § 300, at 430-431 [Prac 2d ed][same]). Cognovit judgments entered in other jurisdictions cannot automatically be denied full faith and credit; rather, enforceability must depend on the facts of each case. More particularly, it must be determined that the judgment debtor made a voluntary, knowing and intelligent waiver of the right to notice and an opportunity to be heard.

[4] In that *Overmyer* and *Swarb* did not raise full faith and credit issues, it is arguable that the determination in *Atlas* that cognovit judgments are not judgments in the ordinary sense of the word would bar enforcement of such judgments in this State. Even assuming the continued validity of this line of reasoning, however, we note that the Pennsylvania cognovit judgment scheme has been amended in several areas relevant to the concerns expressed in *Atlas* (*see*, Pa Rules of Civ Pro, rule 2951 *et seq.*). The main concern in *Atlas* was that the Pennsylvania cognovit procedure provided little in the way of judicial intervention, resembling more a "purely personal act." (25 NY2d, at 230, *supra*). In addition to amending the procedure for opening the cognovit judgment to reduce the burden on the petitioning judgment debtor--thereby facilitating access to a judicial determination of the merits of the underlying claim--the Pennsylvania statute now provides that notice of entry be mailed by the court clerk rather that the plaintiff's attorney (Pa Rules Civ Pro, rule 236). Judgments rendered pursuant to this procedure are therefore "judgments" for full faith and credit purposes.

Defendants make one additional threshold argument concerning the validity of the Pennsylvania judgment, claiming that in the "pre-dispute" context a hearing must be held to

determine waiver prior to the entry of judgment in the forum State (*see, Isbell v. County of Sonoma,* 21 Cal 3d 61, 145 Cal Rptr 368, 577 P2d 188, *cert denied* 439 US 996). The distinction, according to defendants, rest on the indicia of reliability present when the cognovit judgment is entered into following the development of a full-blown controversy. This argument is without merit.

[5] Rather than an artificial dichotomy based on the timing of the "dispute"--one that finds no support whatever--the need for a hearing should be determined on a case-by-case basis. A hearing at some stage would clearly be warranted where the record is insufficient to support a waiver determination (*see, In Re PCH Assocs,* 122 Bankr, at 193-194, *supra*). We cannot agree with defendants, however, that as a matter of law there must in every instance be a pre-judgment hearing to determine whether the debtor waived its right to notice and a pre-judgment hearing. [2]

Thus, there is no *per se* constitutional barrier to enforcement of Pennsylvania cognovit judgments.

III.

[1] We are left then with the Supreme Court's conclusion that "due process rights to notice and hearing

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[2] The California Supreme Court in *Isbell* was concerned with an entirely different procedure. That court--in concluding that a hearing prior to entry of judgment was required--contrasted the California scheme to the Ohio scheme involved in *Overmyer* by emphasizing that California provided for no notice of entry of judgment and several restricted the grounds for post-judgment attack (577 P2d 188, 195). As noted, the Pennsylvania scheme is identical to the Ohio scheme in these respects.

prior to a civil judgment are subject to waiver." (*Overmyer* Co. v Frick Co., 405 US, at 185, *supra.*) All that remains is to apply the waiver analysis in the present case to determine whether defendants voluntarily, knowingly and intelligently waived those rights. We conclude that they did waive those rights as a matter of law.

Defendants were sophisticated parties involved in an arms-length commercial transaction--the transfer of a parcel of land for development as a shopping mall (*see, In re FRG, Inc.* v Manley, 919 F2d 850, 857 [3d Cir]). The purchase price of the land alone was well in excess of $1 million, indicating the magnitude of the project. Furthermore, the parties were represented by counsel in negotiating the terms of the agreement. Defendant Aronow claims not to have had counsel--a fact disputed by plaintiffs--but Aronow himself is an attorney.

Defendants also claim that they received no consideration for the cognovit provision, citing the Supreme Court's observation in *Overmyer* that the creditors in that case had made specific concessions in order to obtain the confession of judgment clause. In fact, the present case resembles *Overmyer* in this respect: defendants sought modification of the payment terms--from a lump sum due at closing to a two-year payment schedule--and in return for this modification executed the bond and warrant. Clearly, that security device was given in exchange for the extended payment schedule.

Finally, defendants argue that, unlike the obligors in *Overmyer,* they were unaware of the cognovit clause, which

they claim was "buried" in the bond and warrant. In *Overmyer*, the Supreme Court noted that the obligor did not contend that it was unaware of the cognovit provision and that "[i]ndeed it could not do so in the light of the facts." (405 US, at 186, *supra*). The facts before us likewise belie defendants' assertion that they were unaware of the cognovit provision. The bond and warrant is a three-page document, with the cognovit clause the only provision on the last page, several lines above defendants' signatures. The bald assertion that these sophisticated defendants, entering upon a significant transaction, did not read the document cannot excuse their legal obligation or overcome the substantial evidence of waiver (*see, Metzger v Aetna Ins. Co.*, 227 NY 411, 416).

As the Supreme Court noted, "where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue." (*Overmyer* Co. v Frick Co., 405 US, at 188n, *supra*.) By contrast, the contract here was not one of adhesion, but rather represented a bargain struck between sophisticated commercial parties. It is clear that defendants made a voluntary, knowing and intelligent waiver of their right to notice and an opportunity to be heard, and should be held to the consequences of their conduct.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock, Jr., and Bellacosa concur.

Order affirmed, with costs.

APPENDIX B - DECISION OF THE NEW YORK STATE COURT OF APPEALS, DENYING REARGUEMNT, DATED FEBRUARY 25, 1992

State of New York
Court of Appeals

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

DECISION February 25, 1992

Mo. No. 124
Leonard S. Fiore, Sr., et al.,

Respondents,

v.

Oakwood Plaza Shopping
Center, Inc., et al.,

Appellants.

Motion for reargument denied with one hundred dollars costs and necessary reproduction disbursements.

APPENDIX C - DECISION AND ORDER OF AFFIRMANCE OF THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE STATE OF NEW YORK, DATED JANUARY 31, 1991 (164 A. D. 2d 737) [PAGES 15a - 23a]

SUPREME COURT, APPELLATE DIVISION
First Department, October 1990

Theodore R. Kupferman, J.P.
Sidney H. Asch
George Bundy Smith
Israel Rubin, JJ.

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Leonard S. Fiore, Sr., Leonard S. Fiore, Jr., Richard F. Fiore, Harry K. Sickler and Thomas C. Large, d/b/a FL&S Associates,

Plaintiffs-Respondents,

against 41213

Oakwood Plaza Shopping Center, Inc., Joseph M. Aronow and Anthony Galioto,

Defendants-Appellants.

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Appeal by the defendants-appellants from an order of the Supreme Court, New York County (Beatrice Shainswit, J.), entered September 8, 1989 which, *inter alia*, granted plaintiffs' motion for summary judgment in lieu of complaint, and denied the cross-motion of defendant Aronow to dismiss the action.

Donald S. Snider, of counsel (Harry B. Frank and Harvey B. Baum with him on the brief; Frank, Aronow & Baum, P.C. and Fink Weinberger, P.C., attorneys) for defendants-appellants

Roy A. Powell, of counsel (Stuart M. Steinberg with him on the brief; Steinberg & Fineo and Jones, Day, Reavis & Pogue, attorneys) for plaintiffs-respondents.

APPENDIX C
[Decision And Order - A. D. 1 NY (1991)]

GEORGE BUNDY SMITH, J.

The issue presented is whether summary judgment in lieu of complaint is appropriate based upon a cognovit judgment secured in Pennsylvania.

By summons and notice of motion for summary judgment in lieu of complaint, plaintiffs, in January 1989, commenced this action for payment of money only alleged to be due and owing under a bond and warrant. Representing a second mortgage, the bond and warrant was entered into in conjunction with an agreement of sale and purchase-money mortgage related to the purchase by defendants from plaintiffs of 14.8 acres of land in Patton Township, Centre County, Pennsylvania. The property was to be developed as a shopping center. In reply papers, plaintiffs set forth that on December 5, 1988 and September 9, 1988, they had obtained cognovit judgments in the Pennsylvania Court of Common Pleas against Oakwood in the amount of $1,287,713.88 and against all the defendants in the amount of $1,216,145 based upon the purchase money mortgage and bond and warrant, respectively. Plaintiffs, therefore, requested summary judgment upon the Pennsylvania judgments.

Citing *Atlas Credit Corporation v Ezrine*, (25 NY2d 219 [1969]), the IAS court granted summary judgment for plaintiffs based upon the two judgments. It concluded that *in personam* jurisdiction had been obtained over the

individual defendants under the Pennsylvania long arm statute (42 Pa Cons Stat §§ 5301, 5322) and that the judgments were conclusive and, therefore, entitled to full faith and credit. The court denied defendants' cross-motion to dismiss, pursuant to CPLR 3211 (a) (7), stating that it was precluded from considering the merits of the Pennsylvania actions.

We affirm the IAS court's grant of summary judgment.

We first note that the "Bond and Warrant," insofar as it incorporated other documents related to the parties' real estate transaction and failed to set forth a liquidated sum, did not qualify as an "instrument for the payment of money only." (CPLR 3213.) While plaintiffs moved for summary judgment in lieu of complaint on a note for $1.1 million plus interest, the addendum to the bond and warrant, annexed to defendants' papers in opposition, provides in paragraph "4" that the principal amount due plaintiffs depended upon a calculation of the interior square footage defendants would be permitted by local authorities to build. Additionally, the agreement of sale, which survived the closing, provided for offsets against the note in the event of plaintiffs' default. The papers raise an issue of fact as to whether plaintiffs breached their contractual obligations under the agreement of sale.

There was no bar to the IAS court's consideration of plaintiffs' claim for full faith and credit enforcement of a foreign judgment upon the bond and warrant. (CPLR 2001; *see, Siegel,* Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2214:3, 70). CPLR 3213 authorizes a motion for summary judgment in lieu of complaint in an action "upon an instrument for the payment of money only or upon any judgment". That plaintiffs sought judgment on this note was set forth in its notice of motion made pursuant to CPLR 3213. While plaintiffs for the first time in their reply claimed reliance upon the Pennsylvania judgments, defendants availed themselves of an opportunity to oppose the claim in their surreply. Hence, consideration of plaintiffs' full faith and credit claim resulted in no prejudice to a substantial right of defendants. (CPLR 2001; *Russell v Trask Co.,* 125 AD2d 136 [3rd Dept. 1987]; *Fletcher v. Greiner,* 73 AD2d 591 [2nd Dept. 1979].)

Similarily, the IAS court correctly concluded that upon its consideration of the facts, the Pennsylvania cognovit judgment on the Bond and Warrant should be accorded full faith and credit. *(Atlas Credit Corp. v Ezrine, supra; Mallan v Samowich,* 94 AD2d 249, 252-253 [1st Dept 1983]; *mot to amend order granted* 97 AD2d 364 [1983]; *North Cent. Pa. Regional Planning & Dev. Commn. v Woodworth,* 154 AD2d 913 [4th Dept. 1989].)

The individual plaintiffs are all residents of Pennsylvania. Plaintiff FL&S Associates is a partnership consisting of the individual plaintiffs and having its principal place of business in Pennsylvania. While Oakwood is a Pennsylvania corporation, defendants Aronow and Galoto, who are secretary and president of Oakwood, respectively, are residents of New York.

By complaint in confession of judgment filed on September 9, 1988, in the Court of Common Pleas of Centre County, Pennsylvania, plaintiffs demanded entry of judgment as authorized by the bond and warrant, in the amount of $1.1 million plus attorney's fees and interest. Plaintiffs' counsel executed a confession of judgment on behalf of defendants and judgment was entered on that same day by the prothonotary of the court in favor of plaintiffs. (Pa Rules Civ Pro, rule 2951 [b], [c].) A notice of entry of judgment and a copy of the complaint in confession of judgment were apparently mailed by the prothonotary to defendants. On November 9, 1988, plaintiffs, by certified and first class mail, served defendants with a request for discovery in aid of execution of that judgment to which defendants did not respond. Copies of these mail receipts are part of the record. On January 6, 1989, plaintiffs filed a motion to compel discovery and for sanctions against defendants which was granted by the Pennsylvania court on January 26, 1989. On January 20, 1989, plaintiffs commenced the instant action in Supreme Court, New York County.

APPENDIX C
[Decision And Order - A. D. 1 NY (1991)]

In *Atlas Credit Corp. v Ezrine, (supra),* the Court of Appeals considered whether a Pennsylvania cognovit judgment, similar to the one presented herein, was entitled to full faith and credit. In *Atlas,* the court concluded that the plaintiff's motion for summary judgment enforcement of the Pennsylvania judgment was properly denied and dismissed the complaint with leave to replead. The Court of Appeals held that the procedure by which cognovit judgments were obtained was repugnant to New York's policy, since inherent in them was the lack of opportunity for notice and hearing prior to entry of judgment. Unlike confessions of judgment under CPLR 3218, the obligors, as a matter of contract and prior to any claimed default, authorize some unknown third party to confess judgment in their behalf. Judge Breitel, writing for the majority in *Atlas,* first noted that full faith and credit under Article IV, §1 of the US Constitution should extend to "judgments" which, by definition, are judicial proceedings or formal decisions rendered in a controversy in which both sides have been given notice and an opportunity to be heard. (25 NY2d, at 230.) By contrast, a proceeding to enter a cognovit judgment on a warrant of attorney is before a prothonotary, or clerk of the court, whose duties are purely ministerial. "The [cognovit] proceedings do not involve the exercise of discretion or judgment usually associated with judicial proceedings . . . [T]he *cognovit* judgment, while not itself a contract, is merely 'the act of the law, invoked by the parties, in executing [their] agreement' . . . [providing for] the court's inprimatur on a

purely personal act." (25 NY2d at 230.) The *Atlas* court found particularly abhorrent a provision in the note which authorized "any Attorney of any Court" to appear on behalf of the obligor and to confess judgment in any court of record within the United States of America, or elsewhere. (25 NY2d at 231.)

It is clear that the Pennsylvania procedure provides for the opportunity to vacate a cognovit judgment and that, to date, defendants have failed to do so. In *D. H. Overmyer Co. v Frick Co.* (405 US 174 [1972] and *Swarb v Lennox* (405 US 191 [1972], *reh denied* 405 US 1049 [1972]), the United States Supreme Court had occasion to consider the constitutionality of cognovit judgments obtained in Ohio and Pennsylvania. In *D. H. Overmyer and Swarb (supra),* companion cases, the Court rejected the contention that, on their face, the Ohio and Pennsylvania cognovit statutes were unconstitutional as violative of a debtor's Fourteenth Amendment due process rights. In *D. H. Overmyer,* the Supreme Court held that the facts before it indicated that Overmyer, a sophisticated corporation represented by counsel, had, for consideration, voluntarily and knowingly waived its rights to prejudgment notice and hearing (405 US, at 187). The holding in *D. H. Overmyer* was extended to individual consumers in *Swarb.* There the court affirmed a District Court finding, after hearing, that appellants, who were acting on behalf of a class of consumer debtors, had not sustained their burden of establishing lack of valid consents in the execution of

bonds and warrants, as to the entire class.

Under Pennsylvania Law, as amended in 1973, a debtor can petition the court to strike or to open a cognovit judgment, raising all defenses. (Pa Rules Civ Pro rule 2959 [e].) Here, on September 21, 1988, the day the cognovit judgment on the bond and warrant was entered, the prothonotary of the court notified defendants of the judgment. Plaintiffs submitted proof that on November 16, 1988, defendants received plaintiffs' request for discovery in aid of execution of the judgment. Receiving no response, plaintiffs successfully moved to the Pennsylvania Court of Common Pleas for an order compelling disclosure and sanctioning defendants. On May 10, 1989, defendants belatedly filed a petition in the Pennsylvania Court to open or strike the judgment. Oral arguments were held on the motion following which defendants' petition was denied. Defendants thereafter filed a notice of appeal of that order with the Pennsylvania Superior Court.

Under the circumstances herein, where the parties were engaged in an arms length business transaction, were represented by counsel, and the defendant was on actual notice of the entry of the judgment and, in fact, sought to challenge same prior to execution, it cannot be said that the cognovit judgment amounted to a deprivation of property rights without due process.

[Decision And Order - A. D. 1 NY (1991)]

Order of the Supreme Court, New York County (Beatrice Shainswit, J.) entered September 8, 1989, *inter alia*, granting plaintiffs' motion for summary judgment in lieu of complaint (CPLR 3213) and denying the cross-motion of defendant Joseph M. Aronow ("Aronow") for dismissal of the action (CPLR 3211 [a] [7]), affirmed, with costs.

Kuppferman, J.P., Asch and Rubin, J.J., concur.

Order, Supreme Court, New York County, entered September 8, 1989, unanimously affirmed, with costs.

APPENDIX D - DECISION AND ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT OF THE STATE OF NEW YORK, DENYING REARGUMENT, DATED MAY 9, 1991 [PAGES 24a - 25a]

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on May 9, 1991

Present - Hon. Theodore R. Kupferman, Justice Presiding
Sidney H. Asch
George Bundy Smith
Israel Rubin, Justices

Leonard S. Fiore, Sr., Leonard S. Fiore, Jr., Richard F. Fiore, Harry K. Sickler and Thomas C. Large, d/b/a FL&S Associates,

Plaintiffs-Respondents,

- against - M-1100

Oakwood Plaza Shopping Center, Inc., Joseph M. Aronow and Anthony Galioto,

Defendants-Appellants.

Defendants-appellants having moved for clarification and reargument of a decision and order of this Court (Appeal No. 41213) entered on January 31, 1991, or, in the alternative, modification of the order of the Supreme Court to stay execution of judgment pending resolution of appellants' counterclaims, and for other relief,

Now, upon reading and filing the papers with respect to said motion, and due deliberation having been had thereon,

It is ordered that said motion be and hereby is denied in its entirety.

ENTER:

s/_____
Clerk

APPENDIX E - ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, DATED AUGUST 3, 1989 [PAGES 26a - 29a]

PRESENT:
Hon. Beatrice Shainswit
Justice

AT I.A.S. PART 10 OF THE SUPREME COURT OF THE STATE OF NEW YORK, HELD IN AND FOR THE COUNTY OF NEW YORK, AT THE COUNTY COURT HOUSE THEREOF, ON THE 3rd DAY OF Aug. 1989.

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LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, d/b/a FL&S ASSOCIATES,

Plaintiffs,

-against-

Index No. 3094/89

OAKWOOD PLAZA SHOPPING CENTER, INC., JOSEPH M. ARONOW and ANTHONY GALIOTO,

Defendants.

ORDER

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[Order of The NYSC NY County (1989)]

Upon reading and filing the Plaintiffs Summons and Notice of Motion for Summary Judgment in Lieu of Complaint both dated the 20th day of January, 1989, the Affidavit of Harry K. Sickler, duly sworn to on the 19th day of January, 1989 and exhibit thereto in support of said Motion and proof of service thereof, the Affirmation of Robert W. Marguelies, Esq., attorney for the Defendant, Anthony Galiato, affirmed the 7th day of March, 1989, in Opposition to Plaintiffs' motion; and the Affidavit of the Defendant, Joseph M. Aronow, duly sworn to on the 20th day of March, 1989, in Opposition to Plaintiffs' motion; and the Defendant, Joseph M. Aronow's Notice of Cross-Motion to Dismiss the Plaintiffs' Complaint dated the 20th day of March, 1989; and the Affidavit of Defendant, Joseph M. Aronow, duly sworn to on the 20th day of March, 1989 in Support of said Cross-Motion; and the Affidavit of Ian Lowell Heller, Esq., attorney for the Defendant, Oakwood Plaza Shopping Center, Inc., dated the 21st day of March, 1989 in Opposition to Plaintiffs' motion; and the Affidavit of David Sweetland, duly sworn to on the 29th day of March, 1989 in further support of Plaintiffs' motion; and the Affidavit of Harry K. Sickler, duly sworn to on the 29th day of March, 1989 in further support of Plaintiff's motion; and the Supplemental Affidavit of the Defendant, Anthony Galioto, duly sworn to the 17th day of April, 1989, in Opposition to Plaintiffs' motion; and the Defendant, Joseph M. Aronow's Affidavit duly sworn to the 24th day of April, 1989 in Opposition to Plaintiffs' Motion: and this matter having come on for Argument before the Court, and after due deliberation having been had thereon, the Court having rendered its

APPENDIX E
[Order of The NYSC NY County (1989)]

Decision on the 19th day of June, 1989; hereto as Exhibit "A".

NOW, on Plaintiffs' motion and Defendant's cross-motion, it is further

ORDERED, that the Motion of the Plaintiffs for Summary Judgment in Lieu of Complaint is granted and the defendants' cross-motion is denied, and it is

ORDERED, that the Clerk enter judgment in favor of the Plaintiffs and against the Defendant, Oakwood Plaza Shopping Center, Inc. in the amount of ONE MILLION TWO HUNDRED EIGHTY SEVEN THOUSAND SEVEN HUNDRED THIRTEEN and 88/100 ($1,287,713.88) DOLLARS plus interest thereon from October 31, 1988 at 9% per annum, and it is further

ORDERED, that the Clerk enter judgment in favor of Plaintiffs and against the Defendants, Oakwood Plaza Shopping Center, Inc., Joseph M. Aronow, and Anthony Galioto in the amount of ONE MILLION TWO HUNDRED SIXTEEN THOUSAND ONE HUNDRED FORTY FIVE ($1,216,145) DOLLARS plus interest thereon from August 20, 1988 at 9% per annum; and it is further

ORDERED, that the Counter-Claims of the Defendant, Oakwood Plaza Shopping Center, Inc., are severed and continued.

ENTER:

Beatrice Shainswit, Justice
Supreme Court, New York County

Law Offices of
STUART M. STEINBERG
1565 Franklin Avenue
Mineola, New York 11501
(516) 747-1136

JONES, DAY, REAVIS & POGUE, ESQS.
500 Grant Street
One Mellon Bank Center
Pittsburgh, Pa. 15119

FILED: September 8, 1989

COUNTY CLERK'S OFFICE
NEW YORK

APPENDIX F - DECISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, DATED JUNE 15, 1989 [PAGES 30a - 35a]

SUPREME COURT: NEW YORK COUNTY
I A S : PART 10

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LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, d/b/a FL&S ASSOCIATES,

Plaintiffs,

-against-

INDEX #3094/89-001
Cal. #6 - - 4/24/89

OAKWOOD PLAZA SHOPPING CENTER, INC., JOSEPH M. ARONOW and ANTHONY GALIOTO,

Defendants.

----------x

SHAINSWIT, J.:

Plaintiffs move for an order, pursuant to CPLR 3213, granting summary judgment in lieu of complaint in the sum of $1,256,387 upon two judgments entered in the Court of Common Pleas, Centre County, Pennsylvania, December 5, 1988. Defendants cross-move for an order, pursuant to CPLR 3211 (a) (7), dismissing this action for legal insufficiency.

[Order of The NYSC, New York County (1989)]

This action arose in connection with defendants' purchase of 1.8 acres in Patton Township, Centre County, Pennsylvania. A Bond and Warrant was executed by all defendants in this action on December 23, 1986, obligating defendants in the amount of $1,100,000 plus interest. At the same time as the Bond and Warrant was executed, defendant Oakwood Plaza Shopping Center, Inc. gave a mortgage to plaintiffs in the amount of $1,100,000.

Having failed to comply with the mortgage payment schedule, Oakwood was served with a complaint in mortgage foreclosure. After Oakwood defaulted, plaintiffs served notice by certified mail that if no answer was filed, judgment would be entered. Oakwood thereafter failed to file an answer or other pleading. On December 5, 1988, the Pennsylvania court entered judgment in favor of plaintiffs and against Oakwood in the amount of $1,287,713.88, and notice of that judgment was served on Oakwood.

The second Pennsylvania judgment in question was commenced against defendants Oakwood, Aronow and Galioto by a complaint in confession of judgment dated September 9, 1988. Pursuant to the authority contained in a Warrant of Attorney, plaintiffs' attorney appeared for defendants and confessed judgment in favor of plaintiffs in the amount of $1,216,145.

With respect to the two Pennsylvania judgments, the notice and opportunity to be heard requirements mandated by Pennsylvania law and the due process clause of the Constitution have been met. Both actions were commenced by the filing of complaints. Additionally, notice of the confessed judgment, along with the complaint, was served on all defendants by the court. Defendant Galioto's argument that he received no notice of the Pennsylvania proceedings is conclusory, vague and unconvincing.

The judgments entered by the Court of Common Pleas of Centre County, Pennsylvania remain unsatisfied, and defendants Oakwood, Aronow and Galioto have failed to pay the judgments.

The judgments of sister states are entitled to full faith and credit so long as the rendering court had personal and subject matter jurisdiction. Such a judgment is entitled to full faith and credit in this state, and is only subject to collateral attack when the courts either lacked jurisdiction or there was fraud in the entry of the judgment (*see Williams v. North Carolina*, 317 U.S. 287).

In personam or personal jurisdiction may properly be exercised by a court in Pennsylvania, subject to a two-prong analysis under the Pennsylvania Long Arm Statute, 42 Pa. C.S.C. Sec. 5301 *et seq.* and under the minimum contact requirements of the due process clause.

As to defendant Oakwood, a Pennsylvania corporation, and defendants Aronow and Galioto, the court of Common Pleas of Centre County had jurisdiction. In light of defendants' admission of Oakwood's status as a Pennsylvania corporation, and Oakwood's transaction of business in Pennsylvania in connection with the acquisition of the intended development of the shopping center project, the Pennsylvania nexus with this defendant is clear.

As to Galioto and Aronow, their negotiations in their capacity as President and Secretary, respectively, of a Pennsylvania corporation in connection with the purchase of the Oakwood property, suffice under the Pennsylvania Long-Arm statute to afford the Court of Common Pleas jurisdiction over them.

The contacts with Pennsylvania were directed at residents of Pennsylvania and property located in Pennsylvania. The mortgage and Bond and Warrant were placed in escrow and subsequently delivered by defendants' counsel acting as escrow agent in Pennsylvania. All of the documents relating to the debt were delivered and recorded in Pennsylvania. Thus defendants' contacts with Pennsylvania exceed the minimum contact requirements of due process [*see Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)]

Defendants' cross-motion is addressed to the merits of the underlying Pennsylvania actions. Specifically,

defendants challenge the validity of the Pennsylvania confession of judgment procedures and ask this court to look beyond the jurisdictional aspects of these proceedings.

On a CPLR 3213 motion to enforce a sister state judgment, this court will not look to the underlying merits of a dispute already resolved in a sister state forum. This court will only consider arguments as to the absence of due process or lack of jurisdiction in the underlying action. Therefore, defendants' cross-motion addressed to the underlying issues in the Pennsylvania actions is denied.

Regarding the issue of the confession of judgment, Professor Siegel comments that:

> "* * * a confession of judgment not guilty of the cognovit's offenses may satisfy due process and, while not being allowed mere registration under CPLR 5401, nevertheless be entitled to full faith and credit and hence New York enforcement through other means, such a CPLR 3213 or a plenary action.
>
> The mere fact that a sister-state judgment was rendered 'by default in appearance, or by confession of judgment' does not mean that it is not entitled to full faith and credit. Default judgments rendered with jurisdiction are surely so entitled * * * and the same goes for confessed judgments taken pursuant to procedures that satisfy due process * * * *" (Siegel, Supplementary Practice Commentariles, CPLR § 5401, p. 136)

All confessions of judgment in New York, whatever

their source, "are always closely scrutinized * * * and in judging them a liberal attitude should be assumed in favor of the judgment debtor" (*see Rae v. Kestenberg*, 23 AD2d 565 *aff'd* 16 NY2d 1023).

Nevertheless, it is well settled law that a judgment is entitled to full faith and credit if it is valid where rendered, it is conclusive in the forum state, and if it is consistent with the due process requirements of the U.S. Constitution. U.S.C.A. Const. Art. IV, Sec. 1: 28 U.S.C.A. § 1738; *see Atlas Credit Corp. v. Ezrine*, 25 NY2d 219.

Sister-state judgments such as those herein, absent jurisdictional defects or lack of finality, should be afforded full faith and credit. In the case at bar, defendants have not denied their cessation of payments required by the Bond and Warrant, nor have they presented any proof sufficient to raise any triable issues of fact regarding the validity of the Pennsylvania judgments. Thus, the defendants' conclusory allegations do not warrant a trial.

Accordingly, plaintiffs' motion for summary judgment in lieu of complaint is granted and the defendants' cross-motion is denied.

Settle order severing the counterclaims and directing the entry of judgment on the motion herein.

Dated: June 15, 1989

s/_____
J. S. C.